United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

To be argued by:
Arthur A. Chalenski, Jr.

Docket No. 75-1328

B
P/S

IN THE
United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

—*v*—

AUSTIN P. WILLIS,

Defendant-Appellant.

On Appeal From the United States District Court
For the Northern District of New York

BRIEF FOR APPELLEE,
United States of America

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PRELIMINARY STATEMENT

This Brief is submitted by the United States of America-Appellee in opposition to the Brief of the Defendant-Appellant dated January 19, 1976. The Statement of the Case should be amended to point out that no exception was taken to the Charge by the trial judge (transcript p. 141, included in Appendix without separate number). Otherwise, the government is not dissatisfied with the Statement of Issue Presented or the Statement of the Case set forth in the Appellant's Brief.

ARGUMENT

POINT I

THE CONSTITUTIONAL VOID FOR VAGUENESS DOCTRINE DOES NOT APPLY TO MERE INSTRUCTIONS.

The defendant-appellant challenges the constitutionality of the Form W-4, Employee's Withholding Allowance Certificate, Government Exhibit No. 3 (Appendix, p. p. 11 & 12) and the instructions addended to the form, Government Exhibit No. 5 (Appendix, p. p. 9 & 10). The appellant does not challenge the constitutionality of the statutes upon which he was convicted, Title 26 U. S. C. §7205 and §3402(f) (2). However, all of the cases cited in the appellant's brief in support of his claim that the Withholding Allowance Certificate, Instructions, and Worksheet under which he was convicted are impermissibly vague (Appellant's brief at 7) apply only to the constitutionality of legislation: Grayned v. City of Rockford, 408 U. S. 104 (1972)(anti-picketing ordinance and anti-noise ordinance); Papachristos v. City of Jacksonville, 405 U. S. 156 (1972) (vagrancy ordinance); Smith v. Goguen, 415 U. S. 566 (1974) (Massachusetts Flag Misuse Statute); Connally v. General Construction Co., 269 U. S. 385 (1926) (Oklahoma Statute providing for the payment of a minimun wage on state projects); Lanzatta v. New Jersey, 306 U. S. 451 (1939) (New Jersey anti-gangster statute); and United States v. Jones, 365 F. 2d 675 (2nd Cir. 1966) (New York disorderly conduct statute).

No cases have been cited by the appellant nor have any cases been found which have applied the unconstitutional void-for-vagueness doctrine to anything other than prohibitory statutes and regulations. The reason for this becomes clear when examining the reasons for the doctrine. These reasons are expressed in Grayned v. City of Rockford, supra, 408 U. S. at 108:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone'...than if the boundaries of the forbidden areas were clearly marked."

As to the first reason, nothing is prohibited by the challenged instructions in the instant case. As to the second reason, nothing in the challenged instructions enlarge the standards by which the criminal statute, 26 U.S.C. §7205, may be applied. Third, since nothing is prohibited, no claim can be made that the appellant's conduct has been limited by the challenged instructions.

POINT II

THE FORM W-4, EMPLOYEE'S WITHHOLDING ALLOWANCE CERTIFICATE, AND THE INSTRUCTIONS THEREUNDER ARE NOT VAGUE.

The only portion of the Form W-4 and the instructions issued thereunder which is challenged by the

appellant in his Brief as vague is that block entitled "Worksheet." This provision is on the back of the instructions to the Employee's Withholding Allowance Certificate, Government Exhibit No. 5, and appears at page 10 of the Appendix. The appellant claims that his misapprehension is that he took the amount on line four and the note quoted to refer to income (Appellant's Brief page 8). This argument, however, ignores that line 4 is merely a direction to perform an arithmetical operation. Line 4 states: "Balance. Subtract line 3 from line 2...." The defendant accurately performed the mathematical operations in line four, and there is no reason to believe that the directions are vague.

The claim of the defendant to the extent that he misunderstood the worksheet must be that he misinterpreted line 2 of the worksheet which calls for the defendant to insert the "Total expected itemized deductions for the year." Given the figure inserted on line 2, the remaining four lines of the worksheet were correctly completed by the defendant. The issue then becomes whether the words "Total expected itemized deductions for the year" can be held to be unconstitutionally vague.

On the first hand, the words "itemized deductions" are precisely measured terms. They are not "abstractions of common certainty", or "terms involving an appeal to judgment or a question of decree" which give rise to a vagueness problem. Note: The Void for Vagueness Doctrine in the Supreme Court, 109 U. of Pa. L. Rev. 67 at 90. The term "itemized deductions" has been in the Internal Revenue Code since 1954. Int. Rev. Code of 1954, Chapter I, Subchapter B, Parts VI & VII. The appellant may have recognized that this term is not vague or ambigous when he referred in his brief to the complexity of the challenged instructions: "complexity of the tax laws" (Appellant's

Brief page 8) and "failure to provide a perjury warning coupled with the complexity of the instructions renders the W-4 Certificate when used as a basis for a criminal prosecution little more than a trap." (Appellant's Brief page 10.) However, none of the cases cited by the appellant strike down a law for complexity.

Furthermore, the appellant's argument that the instructions are too complex to be understood by a reasonable man is without merit, and is contradicted by the appellant's own ability to complete the five items on the worksheet. The appellant correctly completed line 1 which calls for "Total estimated annual salary or wages (from all sources)" by inserting the figure $14,900.00. The defendant inserted a different figure at line 2: "Total expected itemized deductions for the year", the figure being $14,400.00. It is noteworthy that this figure is different from the figure shown on line 1 and refutes any contention that the defendant misunderstood lines 2, 3, 4 or 5 to relate to income, since all remaining computations are based upon the amount set forth in line 2. Line 3 of the worksheet calls for "Appropriate amount from column (A), (B), (C), or footnote 1, above." The defendant inserted the correct figure from the table of $2,400.00 on line 3. Line 4 of the worksheet calls for a "Balance. Subtract line 3 from line 2...."The defendant correctly performed this arithmetical operation by subtracting the $2,400.00 figure on line 3 from the $14,400.00 figure on line 2 to arrive at a figure on line 4 of $12,000.00. The amount on line 5 calls for a computation by the defendant to determine the number of allowances to which he is entitled because of the amount shown on line 4. The defendant performed this computation correctly in determining that $12,000.00 on line 4 entitles him to 16 additional allowances.

Thus, it can easily be seen that the defendant had no difficulty completing the Form W-4, Employee's

Withholding Allowance Certificate, and the Worksheet attached thereto.

Insofar as any reasonable man might have any difficulty performing the calculations, the reverse side of Form W-4 Employee's Withholding Allowance Certificate, contains the following legend in boldface type:

> "If you need more detailed information, see the instructions that came with your last federal income tax return or call your local Internal Revenue Office." (Appendix at page 12).

Accordingly, even if a reasonable man might have trouble with the complexity of the instructions, he is clearly referred to additional places where he may obtain the proper answer.

POINT III

THE LACK OF A PERJURY DECLARATION ON THE W-4 FORM ON WHICH THE APPELLANT WAS CONVICTED DOES NOT RESULT IN A LACK OF FAIR NOTICE THAT CRIMINAL PENALTIES WILL BE APPLIED TO THOSE CONVICTED OF WILFULLY SUPPLYING FALSE OR FRAUDULENT INFORMATION UPON SUCH FORM.

The appellant claims that lack of the perjury declaration causes a lack of fair notice that criminal penalties will be used in prosecutions on the W-4 form and that such lack of fair notice, when coupled with the complexity of form, provides a trap for the unwary. That contention is without merit.

The Government introduced three withholding certificates in evidence. The legends at the bottom of the two certificates on which Willis was found not guilty read as follows:

> "Under the penalties of perjury, I certify that the number of withholding exemptions and allowances

> claimed on this certificate does not exceed the number to which I am entitled." Appendix pp. 5 and 7.

The perjury declaration was not contained in the legend at the bottom of the certificate on which the appellant was convicted. That legend reads as follows:

> "I certify that to the best of my knowledge and belief, the number of withholding allowances claimed on this certificate does not exceed the number to which I am entitled."

The defendant was convicted for violating 26 U.S.C. §7205, a misdemeanor. Under section 7205 the offense is made out when a person required by law to complete and file a W-4 intentionally uses the form to supply false information. United States v. Smith 487 F.2d 329, 330 (9th Cir., 1973), cert. denied, 416 U.S. 989 (1974); United States v. Malnowski, 472 F.2d 850, (3rd Cir., 1973), cert. denied, 411 U.S. 970 (1973).

There is no requirement in Section 7205 that the wilful false or fraudulent statement or omission be made under penalty of perjury. By contrast, compare 26 U.S.C. 7206 in which a written declaration that is made under penalty of perjury is made a specific element of that crime:

> Any person who-
>
> (1) DECLARATION UNDER PENALTIES OF PERJURY.- Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; ....
>
> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Because the perjury declaration is not a necessary element of an offense under 26 U.S.C. §7205, its presence on the W-4 form was mere surplusage. It was removed in the discretion of the Secretary or his delegate pursuant to his power under 26 U.S.C. §6065(a) to provide that no perjury declaration is required:

> -Except as otherwise provided by the Secretary or his delegate, any return, declaration, statement, or other document required to be made under any provision of the internal revenue laws or regulations shall contain or be verified by a written declaration that it is made under the penalties of perjury.

See United States v. Bishop, 412 U.S. 346, 357 (1972).

By removing the perjury declaration, the Government tidied up their forms and removed the only apparent discretion of a U.S. Attorney to prosecute a W-4 violation as a felony under §7206. cf. United States v. Escobar, 410 F.2d 748, 749 (5th Cir. 1969).

The appellant suggests that the deletion of the perjury declaration from the revised [Rev. Aug. 1972] W-4 forms may reflect an administrative determination grounded on 26 U.S.C. §6682 to limit prosecutions for false certificates to the civil penalty. (Appellant's Brief at 10). However, by its very terms the civil penalty under §6682 applies "In addition to any criminal penalty provided by law..." (emphasis added). Section 6682 is not an alternative to criminal penalties, but a supplement to criminal penalties.

Removing the perjury declaration did not result in a lack of fair notice to the appellant that criminal penalties were applicable for withholding allowance certificate violations as suggested at page 11 of the appellant's brief. The statute under which the appellant was convicted, 26 U.S.C. §7205, applies to:

> "Any individual required to supply information to his employer under section 3402 who wilfully supplies false or fraudulent information, or who wilfully fails to supply information..." (emphasis added).

Section 7205 thus requires that a defendant have the requisite warning under the test enunciated in Screws v. United States, 325 U.S. 91 (1944):

> "[W]here the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." 325 U.S. at 102.

CONCLUSION

THE VERDICT AND JUDGMENT OF THE TRIAL COURT SHOULD BE AFFIRMED.

Respectfully submitted,

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